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IN THE SUPREME COURT OF FLORIDA

C. L. ADAMS, F. CLAUDE ADAMS, R. STANLEY ADAMS, MILDRED ADAMS WALTON AND W. H. WALTON, HER HUSBAND, EULA POWELL ADAMS, EULA POWELL ADAMS AND LLOYD SMITH, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF LAWRENCE S. ADAMS, DECEASED, EULA POWELL ADAMS AND LLOYD SMITH, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF LAWRENCE S. ADAMS, DECEASED, AND MAMIE ADAMS SMITH AND CLARENCE SMITH, HER HUSBAND,

Appellants,

vs.

A. N. O'KEEFFE, AS SURVIVING EXECUTOR OF AND UNDER THE LAST WILL AND TESTAMENT AND CODICILS THERETO OF FRANK ADAMS, DECEASED, OLIN E. WATTS, AS ADMINISTRATOR OF THE ESTATE OF RUBYE W. ADAMS, DECEASED, FRANK O. WILDER, PEARL W. POWELL AND MARY SLADE,

Appellees.

JURISDICTIONAL STATEMENT.

Pursuant to the provisions of paragraph 1 of Rule 12 of the Supreme Court of the United States, 1939, the above named appellees and cross-appellants (hereinafter referred to as appellants) file this their separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon

appeal to review the decree of the Supreme Court of Florida appealed from herein, as follows:

1. The statutory provision sustaining the jurisdiction of the Supreme Court of the United States is Section 237(a) of the Judicial Code, as amended, 28 U. S. C. A., Section 344a.

2. The validity of Chapter 18999, Laws of Florida, Acts of 1939, under the Federal Constitution was drawn into question and the decision was in favor of its validity. The statute may be found in Volume 1, General Laws of Florida, Regular Session, 1939, at page 16, and reads as follows:

> "Section 1. That Section 35 of Chapter 16103, Laws of Florida, Acts of 1933, as amended by Section 1 of Chapter 17171, Laws of Florida, Acts of 1935, as further amended by Section 1 of Chapter 18066, Laws of Florida, Acts of 1937, be and the same is hereby amended to read as follows:
>
> "Section 35. DOWER IN REALTY AND PERSONALTY.—Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her said husband, or both, she may elect in the manner hereinafter provided to take dower, which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death, or, which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death; provided, however, that if a decedent, dying either testate or intestate, be survived by his widow and lineal descendants and that none of such lineal descendants are also the lineal descendants of such widow, then such widow shall be limited to dower in the estate of said decedent irrespective of the terms of the will of said decedent, if any, and such dower shall be limited to the portion of the estate of the decedent

to which the widow is entitled under the law of descent and distribution, to-wit, a child's part, and in all cases the portion of the widow, whether said dower or such child's part or share under the will, shall be ratably liable with the remainder of the estate for all estate and inheritance taxes and all costs, charges and expenses of administration; provided, further, that nothing herein contained shall be construed as impairing the validity of the lien of any duly recorded mortgage or the lien of any person in possession of personal property. The homestead shall not be included in the property subject to dower but shall descend as otherwise provided in this Act for the descent of homesteads.

"Section 2. This Act shall take effect immediately upon its becoming a law."

3. The date of the decree sought to be reviewed is May 23, 1941, and the application for appeal is presented July 11, 1941. A copy of the opinion which was delivered upon the rendering of the decree sought to be reviewed is appended to this statement. The opinion has not yet been officially reported. A petition for rehearing was denied without opinion on June 25, 1941.

4. Nature of the Case.

Frank Adams died on February 8, 1940, leaving a will dated April 2, 1924, and several codicils. In a codicil dated May 1, 1937, he provided (R. 21):

"I hereby give, devise and bequeath unto my beloved wife, Rubye Adams, one-third part in fee simple of all the real estate owned by me at the time of my death and one-third part absolutely of all personal property owned by me at the time of my death, which said one-third part of such real and personal property shall be free from all liability for my debts, all estate and inheritance taxes and costs, charges and expenses of administration, the same to be hers in fee simple forever."

In a codicil dated July 14, 1937, the decedent (referring to Chapter 18066, Laws of Florida, Acts of 1937, which was House Bill No. 57, the provisions of which were substantially like the statute involved and under attack, except that it did not apply to estates of persons dying testate) declared (R. 23):

> "At the last session of the Legislature a bill was passed known as House Bill number 57. It changed the law so that without a Codicil to my Will my wife would have received from my estate a child's part. For many years I have wanted and expected my wife to receive not only the homestead and household and personal effects and my automobiles but in addition thereto one-third of my estate freed from the liabilities hereinafter set forth. My children have been advised of my wishes in this regard, but, notwithstanding this my wish, I am certain that my son, Stanley Adams, and some of my other children had a part in the passage of the above named act. This has grieved me and I have worried about it a great deal. In substantially all the donations which I have made to my children and my wife the latter has received one-third of the gross distribution. It has been my settled policy for a long time to give one-third of all amounts distributed to my beloved wife."

Under the provisions of the will and codicils the testator's widow, Rubye Wilder Adams, was bequeathed and devised approximately one-third of his estate and the balance was bequeathed and devised to his six grown children (R. 24, 25). The testator's lineal descendants were not lineal descendants of his widow. The statute involved became a law on April 21, 1939. If the classifications of the small group of widows and testators made by Chapter 18999, the statute involved, are valid and do not contravene Section 1 of the Fourteenth Amendment to the Federal Constitution, the bequest and devise made by Frank Adams

to his widow is void and she must take under the statute, in which event her inheritance will amount to one-seventh of the net estate.

Rubye Wilder Adams, as Executrix, and A. N. O'Keeffe, as Executor, under the will and codicils of Frank Adams, and Rubye Wilder Adams, individually, filed their bill of complaint in the Circuit Court of Duval County, Florida, on June 4, 1940. On October 22, 1940 the said Circuit Court entered a decree in favor of the validity of the statute (R. 119). In the decree the Circuit Court also held that the widow and children of Frank Adams took title to certain assets as purchasers under a trust deed and not as legatees under the will and codicils. This portion of the decree being favorable to the widow the children appealed and the widow and legal representatives filed cross-assignments of error (R. 123, 124). The Supreme Court of Florida reversed the Circuit Court on its interpretation of the trust deed and affirmed the Circuit Court's ruling upholding the validity of the statute involved. After the Supreme Court of Florida had jurisdiction on appeal and on January 19, 1941 Rubye Wilder Adams died. The Supreme Court of Florida entered its order on February 3, 1941 substituting Olin E. Watts, as Administrator of the Estate of Rubye W. Adams, deceased, Frank O. Wilder, Pearl W. Powell and Mary Slade as appellees and cross-appellants in the place and stead of Rubye Wilder Adams.

5. The Federal Questions Were Properly Raised and Were Decided Adversely to the Appellants.

In the bill of complaint filed in the Circuit Court of Duval County, Florida, it was alleged that the statute involved was unconstitutional and void in that (R. 6):

> "The classification of widows as created by the terms of said act is arbitrary, oppressive, capricious and dis-

criminatory and deprives such persons of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States."

The bill of complaint was amended by adding a paragraph which reads in part as follows (R. 46):

"The complainant Rubye Wilder Adams joins in this proceeding severally and jointly with the other complainants. The said Rubye Wilder Adams would be prejudiced and directly injured by the enforcement of the provisions of Chapter 18999, Laws of Florida, Acts of 1939, and the enforcement of said act would very seriously infringe upon her rights. Said statute is void and unconstitutional and inapplicable as to her for the various and several reasons hereinabove set forth."

On October 22, 1940 the Circuit Court of Duval County, Florida, entered an order and the portion dealing with the validity of the statute involved reads as follows (R. 119):

"The Court finds that Chapter 18999 of the Laws of Florida, which became a law on April 21, 1939, is valid."

In the same decree it was held that the widow and children took as purchasers under a certain trust deed, but this portion of the decree which was favorable to the widow was reversed by the Supreme Court of Florida.

The legal representatives and the widow in their cross-assignments of error on the ruling of the Circuit Court with respect to the validity of the statute involved, asserted (R. 123, 124):

"The Court erred in said final decree in not holding that the classification of widows as created by the terms of said act is arbitrary, oppressive, capricious and discriminatory, and deprives such widows of the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States."

"The Court erred in said final decree in not holding that said act is arbitrary, oppressive, capricious and discriminatory, and in conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States."

The opinion of the Supreme Court of Florida rendered on May 23, 1941, states:

"It is contended that Chapter 18999 contravenes the equal protection clause of the Fourteenth Amendment to the Federal Constitution, and Section One, Declaration of Rights, Constitution of Florida, in that it is arbitrary and discriminatory as to widows without lineal descendants."

So the Federal questions were raised specifically in the Circuit Court of Duval County, Florida, and in the Supreme Court of Florida and the decision of each court was adverse to the appellants.

6. The Federal Questions Presented Are Substantial.

The statute under attack was amended at the regular session of the 1941 legislature (Chapter 20844), so that the proviso no longer applies to bequests and devises made to a widow under her husband's will, but only applies in instances where the husband dies intestate. So the proviso creating the obnoxious classifications, which we assert deny to the testator and widow in this case the equal protection of the laws, has been repealed. This proviso remained a law in Florida from April 21, 1939, until the next session of the Florida Legislature which was held in 1941. Chapter 20844, Laws of Florida, Acts of 1941, was introduced as Senate Bill 147 and passed the State Senate on May 20, 1941, three days before the decree appealed from was rendered. It became a law on June 12, 1941.

The statute involved purports to cover "dower" but in the proviso the inheritance of a small, arbitrarily selected group of widows is fixed, and the will of the husband is ineffective and void as to this class of widows while the wills of all other husbands are valid and effective and all other widows have the privilege of inheriting under their husbands' wills without limitations. After providing the dower right of all widows the statute under attack then excepts those widows who have no lineal descendants by the testator surviving him if he has lineal descendants, and the proviso fixes the inheritance of such widows in the husband's estate at a child's part irrespective of the terms of the husband's will.

The small group of testators whose wills are void as to their widows under the proviso are unduly burdened and their privilege of transmitting property to their widows by will is cut off, although this burden is not imposed upon other testators in like circumstances. The small group of widows defined in the proviso is burdened in that their privilege to acquire and inherit from their husbands by will is eliminated and they must take under the statute, although all other widows may receive bequests and devises by will from their husbands and are not so burdened. There is no difference in the situation and circumstances of the classes affected by the proviso and other widows and other testators.

The proviso creates hostile discriminations against a small and arbitrarily selected group of testators and widows and the testator and widow in this case are of that group. The discriminations are of unusual character and thus especially suggest careful consideration to determine whether they are obnoxious to the constitutional provisions. *Hartford Steam Boiler Inspection & Insurance Company* v. *Harrison*, 301 U. S. 459, 81 Law Ed. 1223; *Louisville Gas & Electric Company* v. *Coleman*, 277 U. S. 32, 72 Law Ed.

770. The proviso creates discriminations that have no counterpart in legislative history. Obviously the proviso constitutes private and partial legislation and is not designed to meet the public welfare. There is no public necessity for the discriminations created. *The Bell's Gap Railroad Company* v. *Pennsylvania,* 134 U. S. 232, 33 Law Ed. 892; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 42 Law Ed. 1037. The act is not unlike the private legislation in *Dibrell* v. *Morris Heirs,* 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70, which was stricken down on account of the arbitrary discriminations created.

There is no legitimate object for the statute involved. It does not attempt to protect any person or group. The testator can give by will to anyone he pleases except his widow. His children, grandchildren, great grandchildren, or other lineal descendants are not protected in the least. All of them can be disinherited. The proviso is of no benefit to anyone but simply hostile as to the small selected group of widows and testators defined therein.

The legislation is purely personal and arbitrary. The classifications do not rest upon any reasonable basis. Rubye Wilder Adams and Frank Adams have been denied the equal protection of the laws. *Barbier* v. *Connolly,* 113 U. S. 27, 28 Law Ed. 923; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 Law Ed. 221; *Gulf, Colorado & Santa Fe Railway Company* v. *Ellis,* 165 U. S. 150, 41 Law Ed. 666; *Cotting* v. *Godard,* 183 U. S. 79, 46 Law. Ed. 92; *Smith* v. *Cahoon,* 283 U. S. 553, 75 Law Ed. 1264.

Respectfully submitted,

(S.) Olin E. Watts,
Barnett National Bank Building,
Jacksonville, Florida,
Counsel for Appellants.

EXHIBIT "A".

IN THE SUPREME COURT OF FLORIDA

Duval County.

January Term, A. D. 1941

En Banc.

C. L. ADAMS, F. CLAUDE ADAMS, R. STANLEY ADAMS, MILDRED ADAMS WALTON and W. H. WALTON, her husband, EULA POWELL ADAMS, and LLOYD SMITH, as Executors under the last Will and Testament of Lawrence S. Adams, deceased, EULA POWELL ADAMS and LLOYD SMITH, as Trustees under the Last Will and Testament of Lawrence S. Adams, deceased, and MAMIE ADAMS SMITH and CLARENCE L. SMITH, her husband, *Appellants,*

vs.

RUBYE WILDER ADAMS and A. N. O'KEEFFE, as Executors of and under the last Will and Testament and Codicils thereto, of Frank Adams, deceased, and RUBYE WILDER ADAMS, individually, Appellees.

Opinion Filed May 23, 1941.

An Appeal from the Circuit Court of Duval County, Miles W. Lewis, Judge.

Milam, McIlvaine & Milam and Robert R. Milam, Stafford Caldwell and C. C. Howell, for Appellants, and Cross Appellees.

Jennings & Watts and Olin E. Watts, for Appellees and Cross-Appellants.

Mitchell D. Price and Charles W. Zaring, as Amici Curiae.

TERRELL, *J.:*

Frank Adams died in February, 1940, leaving a will dated April 2, 1924, to which there were five codicils dated

January 19, 1932, January 23, 1932, February 6, 1937, May 1, 1937, and July 14, 1937. The will and codicils were admitted to probate February 23, 1940, and letters testamentary were issued to Rubye Wilder Adams and A. N. O'Keeffe. The codicil dated May 1, 1937, devised to the widow one-third of the estate, the portion allotted to her as dower under Section 35 of the Probate Act.

In September, 1938, Frank Adams conveyed in trust to C. S. L'Engle, D. M. Barnett, and the Barnett National Bank of Jacksonville, securities and properties constituting virtually all of his estate. In 1939, the legislature enacted Chapter 18999, the pertinent part of which is the first proviso of Section One, as follows:

"• • • provided, however, that if a decedent dying either testate or intestate, be survived by his widow and lineal descendants and that none of such lineal descendants are also the lineal descendants of such widow, then such widow shall be limited to dower in the estate of said decedent irrespective of the terms of the Will of said decedent, if any, and such dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to-wit, a child's part, and in all cases the portion of the widow, whether said dower or such child's part or share under the will, shall be ratably liable with the remainder of the estate for all estate and inheritance taxes and all costs, charges and expenses of administration • • •"

The bill of complaint herein was filed by the Executors of Frank Adams' estate naming his children as defendants. It recites that Rubye Wilder Adams is the widow of Frank Adams and that she is not the mother of his children. It recites the execution of the trust deed and alleges that it creates a vested remainder in Rubye Wilder Adams and the Adams Children. It pleads the passage of Chapter 18999, asserts its unconstitutionality, and contends that it affects very little of the Frank Adams estate because the trust deed was executed prior to the effective date of the act and vested most of the estate in the persons named in the will and codicils thereto as remaindermen.

The answer of the Adams children admitted many allegations of the bill of complaint but denied the invalidity of Chapter 18999 or that the trust deed created a vested remainder in Mrs. Adams and the Adams children and withdrew the assets from the estate for administration under the will. On final hearing, the Chancellor adjudicated Chapter 18999 to be valid and the trust deed to create a vested remainder in Mrs. Adams and the Adams Children. He remanded the cause to the probate court for administration of the estate. The Adams children appealed and the complainants took a cross appeal.

The main appeal turns on the interpretation of the trust deed and the cross appeal turns on the validity of Chapter 18999, Acts of 1939. It is contended that Chapter 18999 contravenes the equal protection clause of the Fourteenth Amendment to the Federal Constitution, and Section One, Declaration of Rights, Constitution of Florida, in that it is arbitrary and discriminatory as to widows without lineal descendants.

It is quite true that the act distinguishes between the widow with and the widow without lineal descendants, but is such a discrimination arbitrary and unreasonable? Dower is that portion of the deceased husband's estate admeasured to the widow for her support and the support of the children. It is not a vested right, a privilege, or an immunity protected by the Constitution. Its roots go deep into the history of the law and some feature of it may be observed in every system of jurisprudence known to civilized man. It is one of the earliest elements known to the common law, under which it was one-third of all lands the husband was seized of during coverture. Common law dower has been changed by statute in England and is rarely the same in any two jurisdictions. It has been regulated by statute to meet local conditions and with the view of providing ample support for the widow from such properties as the husband may die possessed of.

Having been accustomed to think of dower in terms of one-third of the husband's estate, it is at first blush somewhat shocking to our traditional concepts to see it reduced to a child's part for the childless widow, but we find no reason to hold that such a change violates any constitutional

mandate. Neither can we say that such a classification is not based on a fair and reasonable economy. Since the basis of it is bread for the widow and children, it cannot be said that the neds of the childless widow are the equivalent of those of the widow on whom there are dependent children. There is no sounder basis for classification than economic considerations. The urge to eat is one of the most impelling impulses of the human species; invite us to a feed and we respond one hundred per cent. We are unfortunately more sensitive to our economics than we are to our vices and virtues.

It is next contended that Chapter 18999 is violative of Section Sixteen, Article Three of the Constitution, in that, (1) it attempts to amend a present statute by its title only, (2) it embraces more than one subject and matter properly connected therewith, and (3) the title is restrictive and deals with dower only while the body of the act deals with wills.

The general theory of appellees on this point is that Chapter 18999, by amending Section 35 of the Probate Act also amends by implication other provisions of said act which are not germane to the title of the amending act.

The Probate Act deals with the subject of wills and the administration of estates. It treats wills, dower and administration as one subject. The purpose of Chapter 18999 was to limit dower for the widow without lineal descendants to a child's part irrespective of the will. We find nothing in the body of the Act that is not germane to the title and the latter is sufficient to apprize the legislature and the public of what the body of the act contemplates; in fact the title is almost as comprehensive as the body of the act.

On the question of whether or not Chapter 18999 embraces more than subject, little need be said. Appellees base this contention on the fact that the act deals with several subjects as one. In the abstract there might be merit to this contention but here we are concerned primarily with the widow's part of the inheritance and whether called dower or by some other name, it is certain that the act in question was designed to limit dower to a child's part regardless of the will or any other instrument affecting it.

We have examined the cases relied on and we do not see that any of them hold contrary to this view.

This brings us to the main appeal which turns on the interpretation of the trust deed. Appellees contend that it (trust deed) created a vested remainder in the beneficiaries named in the will and relieved the estate from administration under the will. They rely on Padfield vs. Padfield, 72 Ill. 322, and like cases to support this contention. Appellants contend on the other hand that the trust deed created a life estate in the settlor and at his death the entire estate reverted to his representatives to be administered under the will. They rely on Hoskin vs. Long Island Loan and Trust Company, 139 App. Div. 258, 123 N. Y. S. 994, affirmed in 203 N. Y. 588, 96 N. E. 1116; Sperry vs. Farmers Loan and Trust Company, 154 App. Div. 447, 139 N. Y. S. 192.

The Chancellor held that the will and the trust deed construed together created a vested remainder in favor of the beneficiaries named in the will which was not affected by Chapter 18999. This interpretation reduces the question to that of whether or not a vested remainder or a reversion was created by the trust deed. If the estate passes direct to the beneficiaries named in the will by virtue of the trust deed and nothing more remains to be done, a vested remainder was created but if it created a bare life estate in the settlor, subject to revocation at any time and at his death something contingent remains to be executed or some expressed purpose remains to be completed, then the estate reverts as directed in the trust deed and a reversion is created.

Stated alternatively, if the inducement in the trust deed is by words of purchase, a vested remainder is created, but if it is by words of limitation, the estate reverts at the death of the settlor and a reversion is created. This question must be determined by an examination of the trust deed but good authorities say that if it falls within any of the following rules, a reversionary estate and not a vested remainder is created: (1) If it transfers the estate in trust with directions to pay the income to the settlor for a certain period at which time the corpus is to be returned to him, (2) If it turns the estate into a trust with directions to

pay the income to the settlor for life and at his death the corpus to be returned to his estate, or (3) If conveyed in trust with directions to pay the settlor the income for life and at his death to dispose of the corpus as he may by deed or will designate or if no other provision be made that it go to his heirs as the law directs.

A great many cases are cited in briefs of counsel and as amicus curiae but they all turn on the interpretation of the granting instrument. The difficulty is to ascertain the intent of the grantor and give it effect. We make no attempt at analyzing cases because all have their variations and the terms of the instrument in each case must govern. In reaching this conclusion, the entire instrument rather than isolated portions of it should control.

The will of Frank Adams names the subjects of his bounty and the portion each is to receive. The trust deed is silent on this point but requires the trustees to convey the estate at his death to his personal representatives to be administered according to the terms of his will. It is true that the trust deed also contains an assignment of the trust estate to those named in the will but this is conditional on what portion the settlor's wife elects to take as dower and in any event each distributive part must pass through the personal representatives named in the will.

The Adams trust deed provides that the trust shall terminate with the death of the settlor at which time the trustees are required to convey the trust property to his (Settlor's) representatives. The trust deed then provides that the trust estate so conveyed together with such other property that the settlor may own at the time of his death, shall constitute his estate and requires its distribution as required in the will and codicils.

After these declarations, the trust deed then assigns, sets over, transfers, and conveys the remaining trust estate to the persons and in the respective amounts described in the will and the codicils thereto. This requirement is followed by the following proviso:

"• • • Provided, however, that in the event settlor's said wife Rubye Wilder Adams survives the settlor and elects to take dower in lieu of the provisions made for her

in said will and codicils, then and in that event, notwithstanding anything to the contrary herein contained, the settlor assigns, transfers, conveys, and sets over to said Rubye Wilder Adams the same proportion of the said Remaining Trust Estate (as above defined) as she would be entitled to if this Trust deed had been owned by the settlor absolutely "at the time of settlor's death."

The provision of the trust deed immediately preceding this proviso is the sole reliance of appellees on which to hang a vested remainder. If it were permissible for one isolated portion to govern the interpretation of the trust deed, we would be persuaded to agree with them but when the entire instrument is considered, we find no intention on the part of the settlor to create a vested remainder for the benefit of his wife and children.

The provision for a life estate in the settlor with reversion to his personal representatives to be administered by the probate court under the terms of the will and the right of the wife to elect dower in lieu of the provision for her in the will lead us to the conclusion that nothing more than a reversionary interest was created by the trust deed. It would be impossible for the wife to elect dower in lieu of the provision for her in the will if this were not the case. Other requirements of the trust deed would also be unenforceable and since this is the case, we do not think the part of the trust deed relied on by appellees to create a vested remainder becomes operative until after the reversion and the administration under the will takes place. This rendering of the trust deed makes it logical; any other renders it ambiguous.

The general rule is that a grant to trustees for life creates a reversion in the grantor and leaves nothing to his heirs by way of remainder unless the plain unambiguous language of the trust instrument shows a contrary intent. Such is the clear implication from John vs. Bowden, 68 Fla. 32, 66 So. 155, and the cases heretofore cited and relied on by appellants. The case at bar falls into this rule.

Does Chapter 18999, Acts of 1939, control the will of Frank Adams, it having been executed prior to the passage of the act?

Counsel contend that this question should be answered in the negative and cite many cases to support their contention. The general rule deduced from all these cases is that a will is ambulatory and takes effect as if executed immediately prior to the testator's death. Such is the mandate of the Probate Act, Section 6, Compiled Gen. Laws, 5477 (2).

We find no exception to this general rule except as to statutes defining formalities of execution, to the effect of marriage on the will, the testamentary incapacity of married women, and the status of after acquired property under the will. These contingencies are taken care of by the Florida Probate Act, so we are confronted with none of them in this case and no good purpose would be served by a discussion of them. Under the Probate Act, there is no vested right under a will until after the death of the testator. Until this time, it is competent for the legislature to direct devolution of property under the will. The decided weight of authority supports this view and the terms of the Probate Act conclude the point.

From this, it follows that the judgment of the Chancellor is reversed on the main appeal and affirmed in all other respects on the cross appeal.

Affirmed in part; reversed in part.

Brown, C. J. Whitfield, Buford, Chapman, and Thomas, J. J. Concur.

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Moffitt v. *Kelly*, 218 U. S. 400, 54 L. Ed. 1086, 31 Sup. Ct. 79, 30 L. R. A. (N. S.) 1178	5
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 313

A. N. O'KEEFFE, as Surviving Executor of and under the Last Will and Testament and Codicils Thereto of Frank Adams, Deceased; OLIN E. WATTS, as Administrator of the Estate of Rubye W. Adams, Deceased; FRANK O. WILDER, PEARL W. POWELL, and MARY SLADE,

Appellants,

vs.

C. L. ADAMS, F. CLAUDE ADAMS, R. STANLEY ADAMS, MILDRED ADAMS WALTON and W. H. WALTON, Her Husband; EULA POWELL ADAMS, EULA POWELL ADAMS and LLOYD SMITH, as Executors under the Last Will and Testament of Lawrence S. Adams, Deceased; EULA POWELL ADAMS and LLOYD SMITH, as Trustees under the Last Will and Testament of Lawrence S. Adams, Deceased, and MAMIE ADAMS SMITH and CLARENCE L. SMITH, Her Husband,

Appellees.

STATEMENT OF APPELLEES MAKING AGAINST JURISDICTION.

The appellees, C. L. Adams, F. Claude Adams, R. Stanley Adams, Mildred Adams Walton and W. H. Walton, her

husband, Eula Powell Adams, Eula Powell Adams and Lloyd Smith, as Executors under the Last Will and Testament of Lawrence S. Adams, deceased, Eula Powell Adams and Lloyd Smith, as Trustees under the Last Will and Testament of Lawrence S. Adams, deceased, and Mamie Adams Smith and Clarence L. Smith, her husband, in pursuance of Rule 12, paragraph 3, of this Court, state the following matters making against the jurisdiction of this Court, asserted by the appellants.

It affirmatively appears from appellants' statement respecting jurisdiction that no substantial Federal question exists as a basis for this appeal.

The ground relied upon by appellants is that the Florida statute (Chapter 18,999, Laws of Fla. 1939) denies equal protection of the laws under the 14th Amendment to the Federal Constitution.

The statute assailed defines a widow's portion in the estate of her deceased husband. It deals with this limited phase of the broader question of descent and distribution. It does not operate when the decedent leaves no descendants. But when a husband is survived by lineal descendants, the statute puts a widow who gave to him such lineal descendants in one class; and puts a widow who gave him none of his descendants into another class. In neither class is the widow denied participation in her husband's estate. For the first class dower is one-third of the gross estate; for the second class, a child's part. The subsequent childless wife is simply placed upon an equality with the testator's children by a previous marriage. Whether the husband leave a will or die intestate, the widow's portion is defined and controlled by the statute.

The assault by the appellant on the statute may be thus stated: That the State cannot distinguish between a widow who bore a testator children and a later wife who bore him none; that the State cannot allow a greater dower to a

widow who gave to the testator blood descendants than to a later wife who did not; that the State is without power to limit the portion of a subsequent childless wife in order to protect the inheritance of the lineal descendants of the testator by an earlier marriage; that the law cannot limit to a child's part the participation of a subsequent childless wife when descendants through a former marriage survive; specifically, that any such distinction in a State statute denies the equal protection of the law to the subsequent childless widow and to the testator.

None of these grounds raise any Federal question.

Dower is the concern of the State, not the Federal Government. It is not an inherent right, the local law gives it or takes it away. Its definition, kind, classification, limits, even its existence, depends upon State law (*Conner* v. *Elliot*, 18 How. 591, 15 L. Ed. 497; 12 Am. Jur. 110; 20 A. L. R. Note p. 1332; 17 Am. Jur. 659). "During the life of the husband, the right is a mere expectancy or possibility. In that condition of things, the law making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish or otherwise alter it, or wholly take it away" (*Randall* v. *Krieger*, 90 U. S. 137, 23 L. Ed. 124, 126).

Treating of the inapplicability of the 14th Amendment this Court recently held, in a case where widows were classified as resident or non-resident:

> "Dower is not a privilege or immunity of citizenship, either state or Federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each state as respects property within its limits. Conner *v.* Elliott, 18 How. 591, 15 L. Ed. 497. *Neither Sec. 2 of Article 4 nor the 14th Amendment* takes from the several states the power to regu-

late this subject; nor does either make it a privilege or immunity of citizenship. Maxwell *v.* Bugbee, 250 U. S. 525, 537, 538, 63 L. ed. 1124, 1130, 1131, 40 Sup. Ct. Rep. 2, and cases cited; United States *v.* Wheeler, 254 U. S. 281, 296, 65 L. Ed. 270, 274, 41 Sup. Ct. Rep. 133."

Evelyn P. Ferry v. *Spokane, Portland & Seattle Ry. Co.*, 258 U. S. 314, 66 L. Ed. 635, 42 S. Ct. 358, 20 A. L. R. 1328.

Such was the reasoning of the Supreme Court of Florida in the opinion in this case:

"Dower is that portion of the deceased husband's estate admeasured to the widow for her support and the support of the children. It is not a vested right, a privilege, or an immunity protected by the Constitution. * * * Common law dower has been changed by statute in England and is rarely the same in any two jurisdictions. It has been regulated by statute to meet local conditions and with the view of providing ample support for the widow from such properties as the husband may die possessed of. * * * Neither can we say that such a classification is not based on a fair and reasonable economy. Since the basis of it is bread for the widow and children, it cannot be said that the needs of the childless widow are the equivalent of those of the widow on whom there are dependent children."

If dower as such is so clearly a matter of State law, then the State's definition of it, quantitatively, and the classification of its recipients would seem to be unquestionably a State function.

In its broader aspect the subject of dower is simply a part of the larger field of descent and distribution. The right to dispose of property by last will and testament is not a common right or an inherent right or a constitutional privilege. It exists wholly by virtue of statute. And it is

subject to change, amendment, and modification in the discretion of the legislature (Page on Wills, 2nd Ed., Vol. 1, Sec. 22, pp. 37-40; Schouler on Wills, Vol. 1, Sec. 15, pp. 17, 18; 26 Ruling Case Law, Wills, Sec. 10, p. 67; 68 Corpus Juris, Wills, Sec. 7, p. 414).

Such has been the uniform holding of this Court (*United States* v. *Fox*, 94 U. S. 315, 24 L. Ed. 192; *United States* v. *Perkins*, 163 U. S. 625, 41 L. Ed. 287, 16 S. Ct. 1073; *Moffitt* v. *Kelly*, 218 U. S. 400, 54 L. Ed. 1086, 31 S. Ct. 79, 30 L. R. A. (N. S.) 1178). And classifying as between lineal descendants and collateral relatives and strangers to the blood is unobjectionable (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594; *Maxwell* v. *Bugbee*, 250 U. S. 525, 63 L. Ed. 1124, 40 S. Ct. 2).

The *Perkins* case, *supra*, held: "• • • the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control;" and then traced out, interestingly, the laws of various nations protecting the inheritance of blood descendants against claims of the widow notwithstanding testamentary disposition. The appellants stress that this statute was amended in 1941, a year after the decedent's death and the taking effect of his will. That is of no consequence—the amendment no more raised a Federal question than did the passage of the original Act or any other Acts on descent and distribution.

It is therefore submitted that the question now presented is one solely of State law, that it is not a Federal question, and, therefore, there is no jurisdiction on this appeal.

There is no basis for writ of error even when a once substantial Federal question is presented, if such question has been clearly foreclosed by former decisions (*Leonard* v. *Vicksburg, etc., R. Co.*, 198 U. S. 416, 49 L. Ed. 1108, 25 S. Ct. 750; *Equitable Life Assur. Assoc.* v. *Brown*, 187

U. S. 308, 47 L. Ed. 190, 25 S. Ct. 123, 125; *Fleming* v. *Fleming*, 264 U. S. 29, 68 L. Ed. 547, 44 S. Ct. 246). With even more force would it seem to follow that when this Court has repeatedly decided that the question presented is not a Federal question, but one for State decision, then no basis for appeal exists.

WHEREFORE, appellees respectfully suggest that no substantial Federal question is disclosed by the record so as to invoke the jurisdiction of the United States Supreme Court upon the appeal from the judgment and decree of the Supreme Court of Florida construing and applying a State statute on descent and distribution dealing with a widow's portion in the estate of her deceased husband located in the State of Florida.

Respectfully submitted,

ROBT. R. MILAM (Jacksonville),
STAFFORD CALDWELL (Tallahassee),
CHARLES COOK HOWELL (Jacksonville),
E. T. MCILVAINE (Jacksonville),
Counsel for Appellees.

No. 313. O'KEEFE, SURVIVING EXECUTOR, ET AL. *v.* ADAMS ET AL. Appeal from the Supreme Court of Florida. October 13, 1941. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *United States* v. *Fox*, 94 U. S. 315, 320–21; *United States* v. *Perkins*, 163 U. S. 625, 627–28; *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U. S. 314, 319; *Stebbins* v. *Riley*, 268 U. S. 137. *Mr. Olin E. Watts* for appellants. *Messrs. Stafford Caldwell* and *E. T. McIlvaine* for appellees. Reported below: 147 Fla. 267, 2 So. 2d 855.